No. 11089

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLEE

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLANT

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
SAMUEL ROSENWEIN,
Attorney,
Office of Price Administration, Washington 25, D. C.

HERBERT BENT,
Regional Litigation Attorney,
San Francisco, California.

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PAUL P. O'BRIEN,
CLERK

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

This is an appeal by the Price Administrator from that portion of a final judgment (R. 35–36) entered in a treble damage action brought by the Administrator pursuant to Section 205 (e) of the Emergency Price Control Act (50 U. S. Code App. Section 925, 56 Stat. 23) which awards damages in the sum

of $21,726.89 instead of $57,448.92 as demanded in the complaint (R. 2–4).[1]

JURISDICTION

Jurisdiction of the District Court was invoked under Section 205 (c) and 205 (e) of the Act and the jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. Code, Section 225). The judgment was entered on January 19, 1945 (R. 36). Notice of appeal was filed April 6, 1945 (R. 37).

STATUTES AND REGULATIONS INVOLVED

The action involves the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, as amended (9 Fed. Reg. 1121) issued under the authority of that Act. Section 205 (e) of the Act reads as follows:

> (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, [within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the

[1] The James Henry Packing Company has filed notice of cross-appeal from the entire judgment (R. 40–41). In this brief, the Administrator is designated as plaintiff; the James Henry Packing Company as defendant.

court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.][2] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the

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[2] As amended by Section 108 of the Stabilization Act of 1944 (June 30, 1944, c. 325, Title I, Section 108, 58 Stat. 640). Formerly read:

"* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum prices, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. [The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]

The Regulation prescribes the maximum legal prices which may be charged for the sale and delivery of beef and veal carcasses and wholesale cuts (Section 1364.451) and prohibits sales above the maximum prices (Section 1364.401). Section 1364.401 of the Regulation reads, in part, as follows:

Prohibition against selling beef and veal carcasses and wholesale cuts, and processed prod-

> *ucts at prices above the maximum*—(*a*) *Beef carcasses and wholesale cuts.*—On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by § 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. The provisions of this Revised Maximum Price Regulation No. 169 shall not be applicable to sales or deliveries of beef carcasses or beef wholesale cuts to a purchaser, if, prior to December 10, 1942, such beef carcasses or beef wholesale cuts have been received by a carrier other than a carrier owned or controlled by the seller, for shipment to such purchaser. "Person," "beef carcass," and "beef wholesale cut" are defined in § 1364.455.
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> *　　*　　*　　*　　*

Another provision of the Regulation (Section 1364.406) forbids evasions of the price limitations set forth in the Regulation. Prior to July 1, 1943 (the violations here occurred between July 1 and November 8, 1943), Section 1364.406 (8 Fed. Reg. 4097) read as follows:

> § 1364.406 *Evasion.*—(a) The price limitations set forth in this Revised Regulation shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef, veal, or processed products

separately or in conjunction with any other commodity or services, or by way of any commission, service, transportation, wrapping, packaging or other charge, or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing or the canning, wrapping or packaging of beef, veal or processed products, or otherwise:

* * * * *

(b) Specifically, but not exclusively, the following practices are prohibited:

* * * * *

(8) Charging, paying, billing, or receiving any consideration for or in connection with any service for which a specific allowance has not been provided in this Revised Maximum Price Regulation No. 169.

Section 1364.406 was amended on August 16, 1943 (8 Fed. Reg. 11445) to add the following subdivision:

(c) Any transaction, device or arrangement whereby a person who sells, transfers, or delivers beef or veal to a retail establishment not wholly owned and operated by such person receives for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer is a violation of this regulation and is prohibited.

The Statement of Considerations which accompanied the promulgation of the amendment is contained in the Appendix herein.

STATEMENT OF FACTS

The complaint alleged that the defendant was a corporation engaged in the business of selling beef and veal carcasses and wholesale cuts, as those terms are defined in Maximum Price Regulation No. 169, and that the defendant between July 8, 1943, and November 8, 1943, had sold its products at prices in excess of the maximum legal prices fixed in the Regulation (R. 3). Annexed to the complaint was a tabulation of the amounts charged and received by the defendant from each of its purchasers in excess of the maximum legal price, and the dates of receipt of said excess (R. 5–10). The total overcharges for the four months' period were $19,149.64 (R. 10). The prayer of the complaint was for treble damages in the sum of $57,448.92 (R. 4). The answer of the defendant (R. 11–12) denied the allegations contained in the complaint except that it admitted jurisdiction of the court and the existence of the Regulation. For an affirmative defense, the defendant alleged that the individuals named in the tabulation annexed to the complaint were its employees and that during the period alleged in the complaint it did not sell to them any beef or veal (R. 11).[3] The defendant persisted in that position throughout the trial.

[3] It is important to observe that the defendant did not plead the partial defense (popularly called Chandler defense) that its violation was neither wilful nor the result of failure to take practicable precautions. Compare, *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 571 (C. C. A. 9th, 1945), cert. den. 65 S. Ct. 1554; *Bowles* v. *Krodel*, 149 F. 2d 398, 399 (C. C. A. 7th, 1945). This failure in pleading was pointed out to the Court by plaintiff's coun-

The evidence at the trial disclosed that the defendant is a corporation engaged in the slaughter house and meat packing business at Seattle, Washington, selling meats and meat products, including beef, at wholesale, to retail meat dealers located at or near Seattle (R. 13). O. B. Joseph is the president and general manager of the company (R. 73), and Almon Ray Smith is its secretary and counsel (R. 153, 138). Prior to July 1, 1943, the defendant found that compliance with the Regulation would compel it to sell its products at a loss (R. 59–60). The defendant therefore sold very little meat prior to that date to retail markets, and these were inferior meats (R. 113). Some time before July 1, 1943, "quite a number" of retailers came to Mr. Joseph to seek his aid and after he had "thought it over for awhile" (R. 80), he decided to see what could be done to furnish the retailers "with good meats and plenty of it." (R. 113).

Two documents were drawn: one, a "lease"; the other, a "contract of employment" (R. 17–20). From

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sel (R. 82–83). If the Court thereafter heard the evidence relative to the circumstances of the violation for the purpose of properly exercising its discretion, it was error (in the light of the failure to plead) to refuse to exercise that discretion upon the ground that the Chandler defense had been established as to the month of July (R. 200–201). The point is noted here parenthetically because this brief is intended to establish that in the light of the evidence adduced at the trial and the Court's findings of fact, it was an abuse of discretion to award less than treble damages against the defendant for its wilful violation of the Act and Regulation throughout the four months' period, July 1 to November 8, 1943.

July 1, 1943 to July 22, 1943, the defendant entered into the two "agreements" (R. 15) with each of twenty-five customers (out of three hundred customers (R. 197)) selected by defendant "as strategic outlets for its meats" (R. 31, 130). By the terms of the "lease" each retailer demised his premises to the defendant for a term of one year at a monthly rental of either $20, $25, $30, or $35 (R. 15). By the terms of the "contract of employment", each retailer entered into the "employ" of the defendant for a period of one year and agreed, among other things, to "properly manage said meat market, and for his services first party (defendant) shall pay to second party (retailer) all remaining receipts and revenues from the operation of said market remaining after deducting all expenses of operation and costs of merchandise and 10 percent (10%) of gross sales" (R. 19–20). The retailers were informed that if they signed the "lease" and "contract", they would be supplied with the quantities of meat they desired (R. 115), and they were so supplied (R. 111). There was no change in the operation of any store after the instruments were signed (R. 111, 131). The retailers "kept on just the same as they did" (R. 131). Concerning these instruments, the trial court in its oral decision stated:

> * * * the lease * * * and the employment contract * * * *were never contemplated* as effective instrumentalities for taking over by the defendant company of the various meat markets. Not a thing was done

> *during the whole four-month* period to indicate such action. * * *
>
> * * * I must hold that neither the lease nor the contract of employment, created what they purported to create on their face, and they were merely the outgrowth of activities on the part of this defendant to meet a situation * * *. (R. 198.) [Italics ours.]

The conclusion of the Court was overwhelmingly supported by the evidence, succinctly summarized in Findings of Fact, V (R. 30–31):

> That defendant neither during the life of said leases and contracts, nor at any time, paid or provided for the payment of any Social Security tax for the alleged managers or other employees of said stores, as provided by law, nor made any inquiry concerning same. That defendant neither during the life of said leases and contracts, nor at any time, filed any applications with the State of Washington for any license to operate said stores or any of them, as required by the laws of the State of Washington, nor did it pay any retail sales tax on any sales made by said stores, nor make or file any returns showing any sales tax or business tax due said State from said stores, as provided by the laws of the State of Washington; that defendant never inquired of the owners of said stores or of said 25 meat markets concerning any of the terms or conditions of their leases with the owners of said premises; that the amount of monthly rental fixed by defendant as lessee of said stores was an arbitrary sum, no part of which was paid or credited to any of said 25 markets; that defendant never gave to any of said 25 markets any instructions as to

the management or as to the books and records kept or to be kept by said stores, and never authorized any of the obligations incurred by said markets; that all invoices from defendant to said 25 markets covering all meats were exactly the same after the execution of said leases and contracts as before; that no change in the operation of said markets was ever given the public either by notices or by signs of any kind; that the operation, management and control of said 25 markets continued in every way without change after the execution of said leases and contracts as before, except that said 25 markets were required to pay defendant a percentage of their gross sales of all meats in addition to the payment of the ceiling or maximum prices fixed by Maximum Price Regulation 169; that no part of said overcharge has been returned to said 25 markets or paid to plaintiff. That said 25 markets were selected by defendant from several hundred markets supplied with meats by defendant at said time as strategic outlets for its meats.

SPECIFICATION OF ERRORS

1. The court below erred in awarding judgment in favor of plaintiff and against defendant for only the excess over the legal maximum of the prices charged by defendant on the sales made prior to September 15, 1943, which are referred to in the findings of fact and conclusions of law.

2. The court below erred in awarding judgment in favor of plaintiff for only $21,726.89.

3. The court below erred in failing to award judg-

ment in favor of plaintiff for three times the excess over the legal maximum of the prices charged by defendant on all of the sales referred to in the findings of fact and conclusions of law whether made before or after September 15, 1943.

SUMMARY OF ARGUMENT

The evidence at the trial established that the defendant intentionally and deliberately violated the Act and Regulation by concealment, subterfuge, and artifice. The defendant was a wilful violator within the meaning of Section 205 (e) of the Emergency Price Control Act. The declared purposes and objectives of the Price Control Act are, in essence, to stem inflationary pressures affecting the economic structure of the nation. The courts and the Administrator are entrusted with the task of enforcing the Act and the regulations promulgated thereunder. The discretion now vested in courts under Section 205 (e) of the Act is a sound judicial discretion, not a personal discretion, controlled by established legal principles and exercised in the light of the public purposes of the statute, and which distinguishes between the intentional and nonintentional violator. In the instant case, it was reversible error for the court to divide the four-month period of violations into two parts and to refuse to assess damages for the first period, and it was an abuse of discretion to award less than treble the amount of the overcharges made during the entire period in view of defendant's flagrant and callous disregard of the Act and Regulation.

ARGUMENT

I

The evidence adduced at the trial overwhelmingly supports the findings of the Court that the defendant was a wilful violator within the purview of Section 205 (e) of the Emergency Price Control Act

"Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law" *United States* v. *City and County of San Francisco,* 310 U. S. 16, 28. "It thus appears that the transaction between defendant and Mrs. Flynn reflected by the two instruments of agreements originating as the record shows it did, in an environment of opposition and resistance by the defendant to oncoming rent control in San Francisco, is more in the nature of a contrivance to circumvent the operation of the Emergency Price Control Act in the Larkin Street apartment house than of a forthright sale of the furniture and furnishings in such property" *Taylor* v. *United States,* 142 F. 2d 808, 812 (C. C. A. 9th, 1944) cert. den. 65 S. Ct. 56.

The record here discloses that the defendant never intended to assume the economic burdens of maintaining the retail establishments; that it never intended to own and operate these establishments; that it executed the "lease" and "contract" for the purpose of evading the Regulation and in order to secure a higher price than the Regulation permitted (Findings of Fact, VI, R. 31); that the defendant never disclosed its real in-

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tent to the Office of Price Administration (R. 204); that it disregarded written notifications sent by the Office of Price Administration to cease its violations on two occasions (Findings of Fact, III, R. 29); that not only did it disregard the two notices, but it thereafter adopted another device to evade the Regulation (Findings of Fact, IV, R. 30); that a quietus on its contumacy was only reached when an indictment was found (R. 127); and when charges in excess of maximum ceiling prices from July 1 to November 8, 1943 had mounted to $19,149.64. Nor was the defendant a neophyte in the retail business for it operated a retail market of its own (not involved in this proceeding (R. 136).

The defendant's witnesses at the trial displayed the same stubborn opposition to the Regulation as in the evasive transactions themselves. Confronted by the testimony that the rents fixed in the "leases" were arbitrary, and by their own stipulation (R. 22) that they had never paid the rent, they asserted that it would have been purposeless since under the "employment agreement" the retailer "would then immediately owe it back." (R. 64, 157.) This untenable argument was clearly an afterthought. The retailer was bound to pay rent, as an "expense", under the dominant lease; the other rent, from defendant to retailer, was the retailer's "revenue" and defendant was bound to pay it under the purported agreement. In any event, it is clear that defendant never intended to pay rent, even under its own thesis. Unperturbed, the defendant suggested another consideration for the leases:

"Why, we furnished these markets with a very good supply of meat and give them a chance to do some business, and a chance to make some money." (R. 102.) The subterfuge in which the defendant indulged was cogently demonstrated in the following colloquy:

> Q. In other words, Mr. Joseph, there is no change in the operation of this store after July the First, than before July the first, was there, as far as you know?
>
> A. Any more than that they were supplied well with good meats. (R. 111.)

Defendant's reliance throughout the trial upon the "lease" and "agreement" glosses over its continuous concealment of the material fact that *it never intended to do what the instruments purportedly affirmed it was doing.* The defendant was a wilful, deliberate, intentional violator. Indeed, the flagrant violations accompanied by the deceptive practices were indicative of criminal intent. Compare, *United States ex rel. Brown* v. *Lederer,* 140 F. 2d 136, 138 (C. C. A. 7th, 1944) cert. den. 322 U. S. 734; *Taylor* v. *United States,* 142 F. 2d 808 (C. C. A. 9th, 1944) cert. den. 65 S. Ct. 56. *United States* v. *Steiner and Miller,* unreported (C. C. A. 7th, Dec. 18, 1945).

Defendant suggested that it had conducted itself according to the forms of law (R. 204), and produced its secretary and counsel as a witness (R. 138). "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended the more

particular the parties to it often are to proceed according to the strictest forms of law" *Graffam* v. *Burgess,* 117 U. S. 180; "And since we are in a field where subtleties of conduct may play no small part, it is appropriate to add that an order of the Board, like the injunction of a court, is not to be evaded by indirections or formal observances which in fact defy it" *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, 437; "It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid for are rent; but this form was used to cover the real transaction, * * *" *Hervey* v. *Rhode Island Locomotive Works,* 93 U. S. 664; "The Government may look at actualities * * *" *Higgins* v. *Smith,* 308 U. S. 473, 477; "To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose" *Gregory* v. *Helvering,* 293 U. S. 465, 470. Thus, a person who in form appeared to be the agent of the defendant was held to be actually the agent of the plaintiff *Fenner & Beane* v. *Holt,* 2 F. 2d 253 (C. C. A. 5th, 1924) cert. den. 267 U. S. 605; a resolution of the board of directors of a corporation characterizing a transaction as a sale was held to be in reality a distribution of dividends, *Phelps* v. *Commissioner of Internal Revenue,* 54 F. 2d 289 (C. C. A. 7th, 1931) cert. den. 285 U. S. 558; a so-called "contract of insurance" was held to be an annuity within the purview of the Revenue Act, *Helvering* v. *Le Gierse,* 312 U. S. 531; the corporate fiction (a Bahaman corporation) was pierced in *Hay* v. *Commissioner*

of Internal Revenue, 145 F. 2d 1001 (C. C. A. 4th, 1944) cert. den. 65 S. Ct. 868; the fiction of a partnership was similarly disregarded in *Tinkoff* v. *Commissioner,* 120 F. 2d 564 (C. C. A. 7th, 1941); and a particular form of business organization will not avert a conviction under the Sherman Act if in truth there is a restraint of trade, *United States* v. *General Motors Corporation,* 121 F. 2d 376, 404 (C. C. A. 7th, 1941) cert. den. 314 U. S. 618.

The record inescapably demonstrates that the defendant deliberately concealed its fraudulent design to evade the Regulation. Fraud exists in the fullest sense of the term when a party intentionally or by design produces a false impression in order to deceive. *Shell Oil Co.* v. *State Tire & Oil Co.,* 126 F. 2d 971 (C. C. A. 6th, 1942); *United States* v. *Proctor & Gamble Co.,* 47 F. Supp. 676 (D. C. D. Mass., 1942). "In a court of conscience deliberate concealment is equivalent to deliberate falsehood. * * * Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud" *Cosby* v. *Buchanan,* 90 U. S. 420.

Within the meaning of Section 205 (e) of the Price Control Act defendant's conduct was clearly wilful. Its actions were deliberate; it knew what it was doing. As such, defendant's conduct came clearly within the condemnation of the statute. *United States* v. *Illinois Central Railroad Co.,* 303 U. S. 239; *Zimberg* v. *United States,* 142 F. 2d 132 (C. C. A. 1st, 1944) cert. den. 655 S. Ct. 38; *Binkley Mining Co.* v. *Wheeler,* 133 F. 2d 863, 871 (C. C. A. 8th, 1943) cert. den. 319 U. S.

764; *Gates* v. *United States,* 122 F. 2d 571, 575 (C. C. A. 10th, 1941) cert. den. 314 U. S. 698. "* * * the transactions themselves * * * leave no doubt as to the defendant's intentions" *R. J. Koeppe & Co.* v. *Security and Exchange Commission,* 95 F. 2d 550, 553 (C. C. A. 7th, 1938); *DiMelia* v. *Bowles,* 57 F. Supp. 710, 713 (D. C. D. Mass., 1944), affirmed 148 F. 2d 725 (C. C. A. 1st, 1944); "The stipulated facts show that the shippers had knowledge of the rates published, and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required" *Armour Packing Co.* v. *United States,* 209 U. S. 56.[4]

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[4] The fact that counsel was offered as a witness does not exculpate the defendant. Counsel was not a disinterested person, for he was an officer of the defendant (R. 153), and it was not within his province to so freely grant indulgences to his client (R. 151–159). No rule of law rewards the clients of lawyers who give favorable but unfounded advice, at the expense of others in the community who are given unfavorable but reasonable opinions on the law. "If the putative taxpayer, in any case of doubt, should be permitted to fail to file a tax return, hoping this failure would never be detected, and then if detection should follow, to escape the prescribed penalty by a mere statement that taxpayer's counsel entertained a subjective belief, whether well-founded or not, that taxpayer was not subject to the tax statute in question, then any statutory penalty provision would become less than a brutum fulmen." *Fides* v. *Commissioner*, 137 F. 2d 731, 735 (C. C. A. 4th, 1943) cert. den., 320 U. S. 797.

The defendant also claimed that an employee of the plaintiff had orally approved the "lease." This assertion was contrary to the facts (R. 162, 180), and the court below so held (R. 204). Compare, *Bowles* v. *Sisk*, 144 F. 2d 163, 165 (C. C. A. 4th, 1944); *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Great Northern Co-op. Ass'n* v. *Bowles*, 146 F. 2d 269 (Em. Ct. of App., 1944).

II

"Discretion" within the meaning of Section 205 (e) of the Emergency Price Control Act is a sound judicial discretion exercised in the light of the public purposes of the statute, and with due regard to the wilfulness or nonwilfulness of the violator

(a) "Discretion" within the purview of Section 205 (e) of the Emergency Price Control Act, as amended, connotes the exercise of a sound judicial discretion whose "testing area must be regarded as being coextensive only with a sound furtherance or protection of the public rights or interest involved" *United States* v. *1,997.66 Acres of Land,* 137 F. 2d 8, 14 (C. C. A. 8th, 1943). "It is the wish of the law and not the will of the judge toward which judicial discretion must always seek to be directed" *United States* v. *1,997.66 Acres of Land, supra,* p. 14. The discretion "must be exercised in the light of the large objectives of the Act. For the standards of the public interest not the requirement of private litigation measure the propriety and need * * *" *Hecht* v. *Bowles,* 321 U. S. 321, 331. Congress and the courts are in common agreement on the purposes and objectives of the Price Control Act. The declared objectives and purposes of the Act, among other things, are to stabilize prices; to protect persons from undue impairment of their standard of living, and institutions from hardships which would result from abnormal increases in prices; to prevent a post emergency collapse of values; and to stabilize agricultural prices. Emergency Price Control Act, Section 1 (a)

(50 U. S. Code App., Section 901). "If we fail on this sector of the domestic front, whatever our success in the field, on the sea, or in the air, victory will be bitter. For of all the consequences of war, except human slaughter, inflation is the most destructive" Senate Report, No. 931, 77th Congress, 2d Session, p. 2; "Congress in Section 1 (a) of the Act has made clear its policy of waging war on inflation" *Bowles* v. *Willingham,* 321 U. S. 503, 514.

The reconversion period raises the problem more acutely. "The fact that the Nation must, without pausing in its stride toward victory, begin now to reconvert its industrial machine to peacetime purposes is no reason to relax our vigilance. We are forewarned by experience. Inflationary pressures today are many times those which World War I produced" Senate Report, No. 325, Part I, 79th Congress, 1st Session (1945) p. 2; to weaken price control "would be to weaken our guard against the disasaters which, unless we are firm in our resolution, inflation can and will yet cause", *Supra,* p. 4.

(b) The administrative needs of the Price Administrator, upon whom the task of enforcing the Act has been imposed, has enlisted the sympathetic aid of the courts. "The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility" *Hecht* v. *Bowles,* 321 U. S. 321, 331; "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should

be construed so as to attain that end through coordinated action." *Hecht* v. *Bowles, supra,* 330. "Any easy attitude of the courts which even remotely suggests that the Act may be violated with impunity strikes at the entire enforcement problem." *Bowles* v. *Montgomery-Ward & Co.,* 143 F. 2d 38, 43 (C. C. A. 7th, 1944); "* * * courts must not forget that they, in coordination with the administrative agency, have a public duty commensurate with the congressional policy and one which they may not escape without abdicating in favor of some other tribunal more responsive to the public needs" *Bowles* v. *Nu-Way Laundry Co.,* 144 F. 2d 741, 746 (C. C. A. 10th, 1944) cert. den. 65 S. Ct. 431.

The treble damage sanction is an essential ingredient of the enforcement program. "Price control which cannot be made effective is at least as bad as no price control at all. * * * Such actions (treble damage suits) have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the Government of a part of the burden of enforcement and to deter initial violations" Senate Report, No. 931, 77th Congress, 2d Session, pp. 8, 9; "This action is the peoples' remedy against inflation. It was written into the statute because the Congress recognized the practical need of this aid to enforcement" Senate Report, No. 922, 78th Congress, 2d Session, p. 14; "In allowing treble damages to an aggrieved litigant, Congress adopted a technique (familiar to us through the Anti-Trust Acts and the Fair Labor Standards

Act) which not only makes the aggrieved person whole, but also gives an interested person a reward for acting as an agent of law enforcement, deters potential violators by a threat of heavy damages and punishes actual violators by the imposition of substantial judgments." *Gilbert* v. *Thierry,* 58 F. Supp. 235, 240 (D. C. D. Mass., 1944), affirmed 147 F. 2d 603 (C. C. A. 1st, 1945).

(c) In *Bowles* v. *Krodel,* 149 F. 2d 398 (C. C. A. 7th, 1945) and *Bowles* v. *Goebel,* unreported (C. C. A. 8th, 1945), the courts declined to follow the suggestion of the Administrator that a judgment for treble the amount of the charges was mandatory under Section 205 (e), as amended, where the defendant offered no testimony to bring himself within the proviso of the statute or failed to establish lack of wilfulness. In the *Krodel* case, the majority of the court held that the lower court may hear evidence relative to the circumstances of the violation "for the purpose of properly exercising its discretion", *supra,* p. 401, but did not rule on whether the lower court had properly exercised its discretion because the Administrator had not raised the question on appeal. In his dissenting opinion, Mr. Justice Kerner declared that the statute vested in the District Court a sound judicial discretion as opposed to unlimited discretion; that it was an abuse of discretion not to require the defendant to pay three times the amount of the overcharges when the record disclosed that the defendant had deliberately tried to evade the regulation establishing the maximum price. "If the public interest is to be pro-

tected and the statute is to have its full and proper deterring effect on prospective wrongdoers, defendant must be penalized", *supra,* p. 401. Probably on this issue there was no conflict between the majority of the court and the minority.

In the *Goebel* case, the court too stated:

> In nothing that we have said, however, is there any implication of course that the court in exercising discretion on whether multiple damages should be assessed or what their amount ought to be has the right or power to act arbitrarily or without sense of official responsibility, or that the broad propriety of its action in a particular case is not subject to being tested on appeal against abuse. Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists. It should hardly be necessary to suggest, for instance, that a mere assessment of single damages for a plainly flagrant defiance of a price regulation would not ordinarily constitute a proper exercise of the power of discretion under the public purpose of the Emergency Price Control Act. As the Supreme Court pointed out in the *Hecht Co.* case, *supra,* 321 U. S. at page 331, 64 S. Ct. at page 592, in relation to the discretion of the courts to grant or deny an injunction under the Act, "their discretion * * * must be exercised in light of the large objectives of the Act. * * * That discretion should reflect an acute awareness of the Congressionl admonition that 'of

> all the consequences of war, except human slaughter, inflation is the most destructive'."
> * * *

It appears clear, therefore, that the discretion of the court under Section 205 (e) of the Act, as amended, must be exercised in the light of the objectives of the Act and must be measured by the standards of the public interest in avoiding inflation and not by the requirements of private litigation.

(d) Congress has itself afforded an additional guide for the appropriate exercise of discretion by the courts. The statute reads, in part:

> Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was *neither wilful* nor the result of *failure to take practicable precautions* against the occurrence of the violation. [Italics added.]

Wilfulness denotes that which is intentional, or knowing, or voluntary, (*Zimberg* v. *United States,* 142 F. 2d 132, 137 (C. C. A. 1st, 1944)), as distinguished from accidental or negligent violation (*Bowles* v. *870 Seventh Avenue Corp.,* 150 F. 2d 819 (C. C. A. 2d, 1945)). Only where the defendant has proved lack of wilfulness and the exercise of practicable precautions is the court deprived of discretion. But if the proviso be not established, or invoked, then it would appear clear that Congress intended the courts in the exercise of a sound judicial discretion to distinguish between the person who negligently or carelessly, but honestly,

endeavors to comply with the law and the contumacy of one who dishonestly violates it.[5]

III

Where the evidence clearly established that the defendant wilfully violated the regulation by deception and subterfuge it was reversible error for the court to refuse to assess damages for a part of the period when the violations occured, and an abuse of discretion to award less than treble the amount of overcharges for the entire period

A critical examination of the evidence adduced at the trial and the District Court's findings of fact and

[5] The Congressional debates lend additional support to the view that "discretion" within the purview of Section 205 (e) of the Act means a sound judicial discretion, the proper exercise of which distinguishes between the intentional and unintentional violator. Indeed, to place the wilful and nonwilful violator upon a parity would appear to subvert Congressional intent. "It is not my intention to protect anyone who wilfully violates the law, * * *. If he cannot prove that he did not wilfully commit the act, he is stuck, and I will not make a plea for him * * *. I am only seeking to preserve a * * * right to show that he was not wilful * * *." (Chandler, 5381, 5382.) (References are to the Congressional Record, Vol. 90, perm. ed.); "when he has not done anything wilfully wrong, when such conditions exist the courts shall have the right to listen to him * * *." (Hawkes, 5441); "* * * unless the proposed amendment is adopted there will be put upon a parity those who wilfully violate the law and those who unintentionally violate it." (Revercomb, 5444); "I am very happy to be advised of the Hecht case * * *. Let the Congress * * * follow the holding of the Supreme Court * * *." (Revercomb, 5445); "* * * to protect those who are innocent, and who might inadvertently or unintentionally violate some rule or regulation." (Hatch, 5447); "If he does it deliberately, I think the O. P. A. is right. If, on the other hand, he does it through oversight or does it to a very minor extent, * * *." (Wright, 5885); "The amendment leaves this bill thoroughly effective against the dishonest merchant and the chiseler, but protects the honest merchant from being penalized for an honest mistake." (Goodwin, 5886.)

conclusions of law, viewed in the light of the expressed public policy of the Act, leads to the conclusion that the court erred in failing to grant plaintiff treble the amount of overcharges. As we have shown, the trial court is vested with a sound judicial discretion, not a personal discretion. There is no exercise of a sound judicial discretion where the court's action is based upon an erroneous conception of the law or the relevant facts. *Ring* v. *Spira,* 148 F. 2d 647, 650 (C. C. A. 2nd, 1945); *Bowles* v. *Nu-Way Laundry Co.,* 144 F. 2d 741 (C. C. A. 10th, 1944); *Bowles* v. *Meyers,* 149 F. 2d 440 (C. C. A. 4th, 1945); *Bowles* v. *Sanden & Ferguson Co.,* 149 F. 2d 320 (C. C. A. 9th, 1945); *Bowles* v. *Simon,* 145 F. 2d 334 (C. C. A. 7th, 1944); "Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts," *Union Tool Co.* v. *Wilson,* 259 U. S. 107.

The violations here occurred between July 1, 1943, and November 8, 1943. Here is the manner in which the court assessed the damages: (1) July 1 to July 31—no assessment of damages (solely restore overcharges); (2) August 1–August 31—no assessment of damages (solely restore overcharges); (3) September 1–September 15—no assessment of damages (solely restore overcharges); (4) September 16–November 8 —1½ times the overcharges made during that period (R. 200–202, 207–210).

While it is customary to treat the return of overcharges as "damages," it may at the outset be observed that the term is inappropriate, for the malefactor can hardly be "damaged" if he is required to

return the loot. The exercise of a sound judicial discretion would require a consideration of the fact that a mere restoration of the overcharges will encourage, rather than deter, violations, especially when the violation is plainly willful. In the instant case, for example, the defendant who deliberately flouted the Regulation has only been required to return the overcharges made during the first half of the period when the violations occurred. The defendant thus has been treated in precisely the same fashion as one who was nonwillful and took every practicable precaution to avoid the occurrence of the violation. Moreover, although the Court in its discretion could have imposed statutory damages of $38,299,28 (in addition to the overcharges), the actual amount assessed by the Court in addition to the overcharges was $2,577.25. Under the circumstances revealed in the record, where the defendant here willfully concealed the material and qualifying facts that it had no intention of becoming the owner and operator of the retail markets (R. 198), that it had no intention of assuming the economic burdens of the retailers, it was error for the trial court (in the light of its own findings) to create a dichotomy in the four-month period of violations and award less than the treble damages demanded in the complaint. The court's discretion was exercised upon the basis of personal factors which overlooked the facts and misapprehended the law.

1. July 1–July 31

The trial court stated that "there was neither a willful violation nor was such violation the result of

failure to take practical precautions against the occurrence of a violation during the month of July. The defendant through its president and manager, and through its counsel, sought to work out some plan whereby they would not violate the law, and yet be able to carry on their meat-processing business at a rate and to a degree sufficient to insure its survival" (R. 200). The difficulty with the court's position is that the evidence established (and the court so found R. 30, 31) that the *defendant worked out a plan to violate* the law. The "practicable precautions" which the defendant took was *to avoid detection,* not to avoid violations. Congress intended the words "practicable precautions" to encompass solely the forthright efforts of a prodent man to comply with the Act; not the efforts of a violator intent on evasion. It is clear that the proviso contained in Section 205 (e) of the Act was unavailing to defendant. Any other ruling would be completely inconsistent with the court's findings of fact and conclusions of law, and run counter to the plain language of the statute and the decisions which have interpreted it. Nor was the court entitled to consider the hardship which the Regulation allegedly inflicted on the defendant. Those are matters which are committed to the exclusive jurisdiction of the Emergency Court of Appeals (Section 204). *Bowles* v. *Willingham,* 321 U. S. 503; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Nu-Way Laundry Co.,* 144 F. 2d 741 (C. C. A. 10th, 1944); *Bowles* v. *American Brewery, Inc.,* 146 F. 2d 842 (C. C. A. 4th, 1945); *Bowles* v. *Bayview Manor Homes,* 145 F. 2d 618 (C. C. A. 4th, 1944); *Bowles* v. *Hurvitz,* 58 F. Supp. (D. C. W. D. N. Y., 1944).

"* * * it is not competent for the court to consider the fairness or the equity of any regulation or price schedule established thereby * * *. If the hardships recognized by the trial court as constituting the basis for a denial of the injunction are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere in the Act, Section 203 (a) and 204 (a) (b) (c) (d) and not in the trial Court" *Bowles* v. *Nu-Way Laundry Co., supra,* 746, 748.

2. August 1–August 31

The court stated: "It is evident that upon the receipt of that letter (Pltf's Ex. 1, R. 122) there was some condition about Mr. Joseph's health, or something of that nature, * * * that caused him to take no immediate action. That would be no excuse whatever in a matter of so vital importance as this is; however the O.P.A. took no action, but by August 30th there was again a letter (Def'dt's Ex. A–3, R. 87) from them to the defendant * * * *which again clearly indicates * * * that the conduct of the business under this arrangement would be looked upon and taken as an evasion and a violation,* and while there is some language by the writer of that letter that there might be further conferences, that is not sufficiently persuasive for me in the exercise of discretion to say it meant that the same practices should continue thereafter indefinitely, however because of the writing of that letter and the negotiations which had taken place wherein the defendant was seeking to take reasonable precautions to avoid becoming subject to damages and penalties, cause me to hold that for the

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month of August, likewise, they should be liable for the amount of the overcharges." (R. 201.)

Letters sent by employees of a governmental agency to a defendant advising it that its conduct constitutes a violation of the Act and Regulation, requesting cessation of such conduct, and inviting defendant to confer with the office, do not cloak the defendant's conduct with legality nor lessen the wilfulness of the offense. Compare, *Utah Power & Light Co.* v. *United States,* 243 U. S. 389. The "negotiations" to which the court refers were the artifices in which defendant indulged while concealing its real illegal intent—and, we again assert, the court so found (Findings of Fact V, VI, R. 30, 31; R. 195, 197, 198, 204, 205).

3. September 1–September 15

Failure on the part of the court to distinguish between the exercise of a personal discretion and a sound judicial discretion enabled the defendant to bargain for another two weeks' absolution (R. 207–210); this, because the letter of August 30th from the Office of Price Administration to the defendant (Def'dt's Ex. A–3, R. 87) calling for a cessation of violations contained the following sentence: "A reasonable time will be allowed to effectuate a termination before we proceed with legal action." (R. 209.) Since the defendant never ceased its violations (until November 8, and the indictment), no apparent reason exists for an exercise of discretion in its favor. A reasonable time to terminate the devices used to further illegal conduct does not render the conduct legal nor constitute a release of the Administrator's claim for treble damages.

"A holding in favor of the defendant here would be tantamount to a holding that the Act and Regulation need not be complied with until action is brought, and that escape without consequence may be had by then submitting to the law" *Bowles* v. *East Penn Weaving Co.,* 57 F. Supp. 127, 128 (D. C. E. D. Pa., 1944).

4. September 16–November 8

No reason was advanced by the court for the grant of only 1½ times the overcharges made during this period. The damages were granted because the court found that "the violations were knowingly made, and were the result of a failure to take practicable precautions." (R. 202.)

It is submitted that the court committed reversible error in differentiating between the period from July 1 to September 15, and the period from September 15 to November 8. Because the gravamen of the defendant's offense was the subterfuge in which it indulged (and not the forms it used to conceal that subterfuge), the distinction drawn by the court was "illusory", *Taylor* v. *United States,* 142 F. 2d 808, 813 (C. C. A. 9th, 1944) and "baseless", *United States* v. *C. I. T. Corporation,* 93 F. 2d 469, 471 (C. C. A. 2nd, 1937).

The defendant was a wilful violator who flagrantly disregarded the terms of the Act and Regulation by evasion and subterfuge; whose scheme was engendered in "an environment of opposition and resistance" to the Act and carried out through resort to artifices intended to conceal the fraud-

ulent plan. Under circumstances such as these, the courts have held it to be an abuse of discretion to deny the injunctive sanction provided in the Act. *Bowles* v. *Nu-Way Laundry Co.,* 144 F. 2d 741 (C. C. A. 10th, 1944); *Bowles* v. *Sanden & Ferguson,* 149 F. 2d 320 (C. C. A. 9th, 1945); *Bowles* v. *Simon,* 145 F. 2d 334 (C. C. A. 7th, 1944); *Lenroot* v. *Interstate Bakeries Corp.,* 146 F. 2d 325 (C. C. A. 8th, 1945); *Bowles* v. *Meyers,* 149 F. 2d 440 (C. C. A. 4th, 1945), and have upheld resort to the criminal sanction. *Taylor* v. *United States,* 142 F. 2d 808 (C. C. A. 9th, 1944); *United States ex rel. Brown* v. *Lederer,* 140 F. 2d 136 (C. C. A. 7th, 1944); *United States* v. *Steiner and Miller,* unreported (C. C. A. 7th, Dec. 18, 1945). It is submitted that the rule is equally applicable to the sanction of the treble damage suit. The exercise of a sound judicial discretion, to accomplish the declared objectives of the Act, requires not only that a distinction be drawn between wilful and non-wilful violators, but that treble damages be assessed against those who intentionally and deliberately violate the Act in complete disregard of its terms, especially when, as in the instant case, the violations occur through the concealment of material facts. Congress, by its amendment to Section 205 (e), did not intend any additional benefit to this defendant.

CONCLUSION

The judgment in so far as appealed from should be vacated with directions to enter judgment in a sum treble the amount of the overcharges, as demanded in the complaint.

George Moncharsh,
Deputy Administrator for Enforcement,
Milton Klein,
Director, Litigation Division,
David London,
Chief, Appellate Branch,
Samuel Rosenwein,
Attorney,
Office of Price Administration, Washington 25, D. C.
Herbert Bent,
Regional Litigation Attorney.
San Francisco, California.

APPENDIX

Statement of Considerations Accompanying Amendment to Section 1364.406 of Maximum Price Regulation 169 (August 16, 1943)

"The accompanying amendment prohibits the creation of any device or arrangement whereby a slaughterer or wholesaler delivers beef or veal to a retail establishment and receives for the meat a greater realization than he would be entitled to receive if he sold the meat to that establishment under this regulation. The prohibition does not apply to the ownership and operation of a retail store by a slaughterer or wholesaler. This action is necessitated by recent developments which threaten the complete destruction of the wholesale ceilings, a sharply inflationary rise in the price of meat, serious maldistribution, and the independence of meat retailers. The fundamental cause of these developments is the serious shortage of beef relative to the supply available for civilian consumption.

"Retailers are desperately eager to secure beef for their customers. Business can continue for a time on an inadequate margin; it cannot exist at all without meat to sell, and beef is the preferred meat. Retailers have consequently been willing to acquiesce in arrangements which have the effect of giving to the packer part of the retail operating margin established by the spread between the wholesale and retail ceilings. The arrangements proposed, and in some cases put into operation, vary in detail and in the legal form which they adopt. They have in common one fundamental characteristic: the slaughterer receives a greater amount for his meat than he could lawfully charge

under the regulation, and the retailer continues to operate and maintain his business establishment. By retaining title to the meat until it is sold to the consumer, the slaughterer nominally accepts the risk of not being able to sell the meat to consumers. But under present conditions there is actually no risk of being unable to sell beef to consumers. The return of current operating expenses is assured by the delivery to the retail establishment of a sufficient quantity of beef. And a short-term cancellation clause usually protects the slaughterer from incurring any substantial expense in connection with the maintenance of the retail establishment.

"Continuation of this tread will enable the participating slaughterers to pay a higher price for cattle than the wholesale ceiling prices for beef will support. Stabilization of cattle prices will become impossible. The prices for the sale of beef to the war agencies will have to be increased, further inflating cattle prices. Packers unable to acquire the use of retail outlets—including the four largest, who are precluded by consent decree—will have to be granted an increase in ceiling prices for the sale of beef in the civilian market. Retail margins will thereby be contracted to a point which will fail to return the costs of retail operations, and a rise in retail meat prices will become inevitable. The effort to control the price level on an important cost of living commodity will fail, with catastrophic results for the entire stabilization program.

"Even if direct controls on cattle prices were in effect, the by-passing of the wholesale ceilings would have disruptive effects on the distribution of meat. The paramount demand for beef would enable slaughterers to exact an unduly high price for retailers. Beef would tend to move only to those retailers willing

to participate in such a scheme, preventing an equitable distribution of the available supply. The resulting pressure would make extremely difficult the enforcement of dollar and cents retail ceilings, and threaten the actual level of retail beef prices.

"Most of the devices which have come to the attention of the Price Administrator are already illegal because they clearly evade the price limitation of the regulation. The accompanying amendment does no more than make specific a principle already implicit in the regulation. An explicit prohibition is deemed desirable to avoid dispute as to the application of the principle to various plans differing in detail and in legal form, and to emphasize the critical nature of the issue involved.

"The prohibition does not extend to cases where the slaughterer purchases unconditionally a retail establishment and operates that establishment for the sale of meat slaughtered by him. Such an arrangement cannot be regarded as an evasion of the regulation. The slaughterer assumes the full economic burden of maintaining the retail establishment. Only so long as he discharges that burden in full can he realize the benefits sought. And he assumes the risk of loss should the maintenance of the establishment for any reason become undesirable. The magnitude of the economic risk involved is a sufficient guarantee that the expedient will not be adopted to such an extent as to bring about the consequences previously explained. Moreover, there is precedent in the industry for this type of transaction, precedent which is wholly lacking for the evasive devices which the accompanying amendment expressly prohibits.

"In §§ 1364.405 (d) and 1364.407 (e) (2), the dates July 20, 1943, and July 26, 1943, are changed to August 20, 1943, and August 14, 1943, respectively."

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